

Anti-Doping Appeal Panel

J.L.N Stadium, Gate No. 10 Hall No.103
1st Floor, Lodhi Road, New Delhi 110 003
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To,

Date: 21.04.2022

Ms. Kirti Bhoite
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Subj: Decision of the Anti-Doping Appeal Panel Case No.-09/ADAP.2021

NADA Vs. Ms. Kirti Bhoite

The order containing the decision of the Anti-Doping Appeal Panel dated 18.04.2022 in respect of final hearing of the above case held on 08.04.2022 is enclosed.

The receipt of this communication may be acknowledged.

Encl: 05 sheets.



(Yasin Arafat)

Copy forwarded together with the copy of the order containing the decision of the Anti-Doping Appeal Panel for information and action deemed necessary:

1. World Anti-Doping Agency, Stock Exchange Tower, 800 Place Victoria (Suit 1700) P. O. Box 180, Montreal (Quebec), H4Z 1B7, Canada.
2. Secretary General, Athletics Federation of India, A-90, Naraina Industrial Area, Phase-1, near PVR cinema, New Delhi- 110028.
3. International Association of Athletics Federations, 17, Rue Princesse Florestine BP 359, MC 98007, Monaco.
4. National Anti-Doping Agency, J.L.N Stadium, 1st Floor, Hall No. 104, Lodhi Road, New Delhi, 110003

BEFORE THE ANTI DOPING APPEAL PANEL

J.L.N. Stadium, Gate No. 10, Hall No. 103,

Lodhi Road, New Delhi -110 003

(PROCEEDINGS CONDUCTED THROUGH VIRTUAL MODE)

Appeal No.- 09/ADAP/2021

IN THE MATTER OF:

Ms. Kirti Bhoite APPELLANT
(Sport – Athletics)

Vs

National Anti-Doping Agency RESPONDENT

Quorum: Mr. Abhinav Mukerji, Chairperson
Dr. Vivek Singh, Member
Ms. Prashanti Singh, Member

Present: Mr. Parth Goswami, Advocate for the Athlete with athlete in person
Mr. Yasir Arafat Law Officer for NADA.

Date of Hearing: 08.04.2022

Date of Order: 18.04.2022

ORDER

1. The Appellant Ms. Kirti Bhoite (Athlete) has filed an appeal against the order dated 29.06.2021 passed by the Anti-Doping Disciplinary Panel in Case No. 135.ADDP.01.2019 (“impugned order”).

2. The facts of the case as available from the records before the Anti-Doping Disciplinary Panel are as follows:

(i) The doping control test of the Appellant was carried out by the Doping Control Officer of NADA during 3rd Khelo India Youth Games 2020 held at Guwahati. Urine Sample of the Appellant upon collection were sent to Anti-Doping Lab, Doha, Qatar a World Anti-Doping Agency (WADA)-accredited laboratory. The Laboratory analysed the A Sample in accordance with the procedures set out in the WADA’s International Standard for Laboratories. Analysis of the A Sample returned an Adverse Analytical Finding (AAF) for the following:

“S1.1 Anabolic Androgenic Steroids (AAS)/Drostanolone metabolite 2A-methyl-5a-an-drostan-3a-ol-17-one. An Anabolic Steroid under S1 of WADA’s 2020 Prohibited List which are non-specified substances”

(ii) Consequently, NADA issued a notice of charge dated 09.03.2020 for violation of Rule 2.1 of the Anti-Doping Rules of NADA, 2015 ("ADR"). The notice of charge imposed a mandatory provisional suspension with effect from the date of notice. Initial reply from Appellant was received on 27.03.2020, wherein, it was informed that due to coronavirus outbreak the Appellant could not meet her doctor who had prescribed certain medications to Appellant and thus requested for some more time to reply, the Appellant also opted for Sample B Analysis which was done on 19.08.2020, the analysis of Sample B corroborated the findings of Sample A thus second notice was sent to Appellant on 24.08.2020.

(iii) By the way of impugned order an ineligibility of 04 years under Article 10.2.1.1 from the date of provisional suspension have been imposed upon Athlete. Hence, this appeal.

3. We have heard both the parties at length. The Appellant's primary contention is that her family does not have any background in sports therefore she was completely dependent on her coach (Mr. Mickey Menezes) for training purposes. The Appellant and her family blindly trusted the guidance and ability of her coach Mr. Menzes, who himself is a former National Athlete. The Appellant states that she was involved in rigorous training sessions due to which she started experiencing general weakness and exhaustion. Therefore, her coach introduced multivitamins, in form of tablets and injections in her diet for recovery. In sheer good faith, the Appellant took these multivitamins which resulted in Anti-Doping Rule Violation ("ADRV"). On receipt of Notice of Charge, the Appellant tried to establish connection with her coach, the coach stopped responding to her calls and even when the coach responded to calls, he avoided talking about the Notice of Charge. Thereafter, the Appellant filed complaint against her coach before Maharashtra Athletics Association ("MHAA") requesting to intervene in the manner and take action against the coach Mr. Menzes. It was further contended before us by the Appellant that her case has been decided by Ld. ADDP in absence of enquiry report from MHAA, thus, she has been denied fair opportunity to present her best evidence. It was lastly contended by the Appellant that she has not consumed any prohibited substance intentionally rather it was due to fault of her coach, thus she prays for exoneration from doping charges.

4. On the other hand, Sh. Arafat, Ld. Law Officer on behalf of NADA submitted that the prohibited substances were found in urine sample of the Appellant and under Article 2.1.1 it is an athlete's responsibility to ensure that no prohibited substance enters his/her body and further that under the said Article it is not necessary that intent, fault or negligence is required to be demonstrated to attract the provisions of Article 2.1. It was contended that the Appellant has failed to adduce any appropriate explanation with regard to presence of prohibited substance in her urine sample. It was asserted that the Appellant has no Therapeutic Use Exemption ("TUE") to justify the presence of the aforesaid prohibited substance. It was further submitted that the Appellant did not disclose the factum of tablets and injections given by her coach in her doping control form. Lastly, it was submitted that the impugned order does not warrant interference and present appeal is liable to be dismissed as the Appellant has failed to rebut the presumption that ADRV was not intentional. Ld. Counsel for NADA has relied upon

CAS decision in WADA v. Indian NADA & Dane Pereira to substantiate “indirect-intent” and Athlete’s duty to verify contents of medications considering the manifest risk associated with medications.

5. By way of an order dated 07.03.2022 this Panel had asked MHAA to communicate to this panel the outcome of compliant filed by the Appellant, pursuant to which an enquiry/status report has been received from MHAA. We have perused the enquiry report sent by MHAA. In the enquiry report it has been confirmed that the coach Mr. Mickey Menezes has been training the Appellant since past 3-4 years and was being paid fees for training purposes. It is also a fact contained in the report that the Appellant was one of the best performing Athletes learning under guidance of Mr. Menzes. The coach Mr. Menzes acknowledged that he used to recommend supplements such as protein, amino acids, energy drinks and pre-workouts to the Athletes. The coach also provided the name and number of suppliers to MHAA from whom he used to procure supplements. He further disclosed that, in month of November-December, 2019 the supplier informed him about a new product “**Propionate**” which was in form of injection. The Coach gave said injection to the Appellant and another Athlete in the month of December 2019. The Coach asserted that he was not aware that the said injection contained any prohibited substance. The report concludes with affirmation that the Coach was well aware that if the Appellant performs well at national level, he would benefit from the same as such he does not hold a clean slate. The report concludes that the Coach was negligent in the manner in which he has surreptitiously given prohibited substance to the Appellant who is a young athlete, training under his guidance and supervision and relied on the Coach for everything. Under these circumstances, MHAA has imposed ban of 4 years on the coach for his reckless and negligent behaviour. The Respondent has not challenged this report or sought to dispute any part of its contents.

6. What emerges for consideration is whether the Appellant deserves any benefit considering the totality of circumstances in the present case. It has been constant stand of the Appellant in her written submissions and as well as in her arguments before Ld. ADDP that she has been administered multivitamin tablets and injection by her coach, she being young and naive trusted the word of her coach. Her parents also reposed their faith in coach Mr. Menzes and did not question his training methods. After testing positive in doping test, she filed a complaint before MHAA for taking action against the coach, outcome of the complaint has been discussed in foregoing para. It is a fact that the coach Mr. Menzes was himself a former athlete and was well aware of the anti-doping laws. It is true that an athlete reposes trust and confidence in his/her coach who is the person responsible for the athlete’s training preparation and tactics. Coach belongs to the category of athlete support personnel, from whom a higher duty to the integrity of the anti-doping system can be expected. In this case the Coach who had a fiduciary responsibility towards the young athlete failed in discharging his duties as a result of which the Athlete unknowingly ingested the prohibited substance.

7. The facts on record establish that the Appellant unknowingly took prohibited substance under supervision of her coach. The conduct of the Appellant is obviously in breach of his duties under the ADR but the moot question that needs to be examined is

whether there an element of intent behind doing so. The Appellant is also bound by Article 22 of the ADR that imposes a duty to be aware of the ADR and its requirement.

8. If the Appellant can establish that the ADRV was not intentional then the Period of Ineligibility is reduced to two years under Article 10.2.2. The criteria for determining 'intention' under NADA ADR has been provided under Article 10.2.3 read with Appendix 2, Application of Consequences – *No Significant Fault would be a sufficient corroborating evidence that the ADRV was not intentional*. Appellant's degree of fault would also be a factor in ascertaining totality of circumstances which lead to ADRV.

9. The Appellant has fairly admitted that she took tablets and injections under advice from her coach. The contention of the Appellant that she was unaware of the contents of the said tablets and injections, the prohibited substances were used in context unrelated to sport performance and the degree of her fault is normal degree of fault considering the totality of the facts and circumstances and her case is covered under the definition of "No Significant Fault or Negligence" also stands established in view of the factors discussed aforesaid.

10. While assessing the degree of fault various factors have been taken into account by the Court of Arbitration in Sport. Some of the cases discussed below give us a yardstick to apply in such cases. In *CAS 2010/A/2107 Flavia Oliveria vs. USADA*, a case of specified substance, the athlete did not receive any formal drug education from USADA or any sports organization prior to her first in-competition drug test that resulted in a positive test for a stimulant, the period of ineligibility was reduced by 6 months. In *CAS A2/2011 Foggo v National Rugby League* - a professional rugby league player purchased and used Jack3d, which resulted in an adverse analytical finding for MHA for a non-specified substance. The athlete's club encouraged the use of pre-workout supplements. The athlete himself had received very limited formal anti-doping education. However, the athlete had been assured by the store owner that the product was clean, and had consulted his conditioning coach, and had undertaken research on the ASADA website in respect of the ingredients of Jack3d which had not resulted in the identification of any specified substances. A sanction of six months ineligibility was imposed.

11. In *CAS 95/150 V./Federation Internationale de Natation Amateur (FINA)* the trainer of a swimmer gave her a pill for a headache being unaware that it contained a banned substance. The trainer was caught by the principle of strict liability, that he could not escape liability by asserting that he had no intention to give a banned substance and was unaware that the pill contained a banned substance. In the aforesaid decision, coach V. was subjected to ban for administering prohibited substance to Athlete R., whereas athlete was left with strong warning.

12. Thus, factors such as experience of an athlete, exposure, guidance of coach, education and exposure to anti-doping camps, level of competition, infrastructure available, conduct of the athlete are some of the relevant factors that have been considered while deciding on the degree of fault of an athlete.

13. Another aspect that deserves consideration is that the Appellant consumed these substances from people in positions of trust i.e. Coach who gave this substance to her. Being a young girl at that point of time her maturity level and awareness was not that

evolved to consult a medical practitioner. Findings of the MHAA also supports the case of the Appellant, it is undisputed fact that the coach Mr. Menzes purchased the injection from the dealer and administered it to the Appellant without disclosing its nature. It is also a fact that in past too, the Appellant consumed supplements provided by Mr. Menzes and thus there was no occasion for the Appellant to probe the contents of the supplements. On the balance of probabilities and specific circumstances of this case, this panel is of view that the case of the Appellant deserves consideration. Mr. Menzes owed the Appellant a high duty of care because he was a coach, and as such someone in whom the Appellant placed considerable trust. The conduct of Mr. Menzes fell far below the standard of care and vigilance required of him in his professional duty as an athletic coach.

14. CAS decision in WADA v. Indian NADA & Dane Pereira relied upon by Ld. Counsel for NADA is on different facts and circumstances. In that case, the medications prescribed by the doctor contained prohibited substances. It was categorically noted by Ld. Arbitrator in that case, that no evidence was produced by the Athlete to substantiate his arguments. Whereas, in the present case, credible enquiry report has been received by this Panel from MHAA, wherein the coach Mr. Menzes has admitted that he administered the injection to Appellant without disclosing its nature to the Appellant.

15. In view of totality of circumstances this panel is persuaded that the ADRV was not intentional and the sanction must be the one in accordance with Article 10.2.2 i.e. for two years. Appellant has succeeded in establishing that the doping was not intentional. However, the Appellant is also warned to be careful in future and to take supplements after establishing the purity of their source and verifying contents of the same and under expert guidance.

16. Therefore, we allow the appeal. The sanction of 4 years ineligibility imposed by the Anti-Doping Disciplinary Panel vide its order dated 29.06.2021 in Case No.135.ADDP.01.2019 is set aside. The Appellant is sanctioned for two years ineligibility in accordance with Article 10.2.2 which shall start from date of provisional suspension i.e. 09.03.2020. A copy of the order be uploaded on the website of the NADA and a copy be sent by registered post to the postal address of the athlete and also emailed to her registered email address as well as forwarded to her counsel.



Prashanti Singh
Member



Dr. Vivek Singh
Member



Abhinav Mukerji
Chairman